IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

DISTRICT:

SECOND APPEAL NO. 1038 OF 2004

Office Notes,Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders

Mr.P.B.Shah for the Appellants.
Mr.S.M.Deshpande for Respondent Nos.2 to 4.

CORAM: S.B.DESHMUKH, J.

DATE : 24TH AUGUST,2006

P.C.:

Heard learned Counsel for the parties.

2. The appellants, were the plaintiffs in Regular Civil Suit No. 27 of 1982 filed in the Court of the learned Civil Judge, Junior Division, Pandharpur, Dist. Solapur. The plaintiffs, in the suit, have prayed for partition and separate possession of their share. The defendants, after service of suit summons, entered appearance and filed their written

statement, Exhibit 22. It is contended by the defendants that the suit property was self-acquired property of one Mr. Rama. Undisputedly, Rama Chavan was the common ancestral of the parties. This Rama Chavan, had executed a will, in favour of defendant nos.2 and 3. The original copy of the will, is misplaced on account of alleged theft. Report with the concerned police station was lodged. Criminal case was also filed against the plaintiffs in relation to alleged theft of document of will. According to the defendants, it was self-acquired property of Rama Chavan and has been bequeathed, by deceased Rama Chavan to defendant nos.2 and 3. In this fact situation, according to the defendants, there is no question of partition of the suit property. The defendants, who also alleged that the plaintiffs have filed, Regular Civil Suit No. 63 of 1973, seeking partition and separate possession of the property. The said

suit came to be dismissed. Dismissal of the suit was challenged by filing appeal under Section 96 of the Code of Civil Procedure.

3. The appellate Court dismissed the appeal and the second appeal filed was also dismissed.

4. Considering the pleadings of the parties, the trial Court had framed as well as five issues. The trial court, has recorded a finding against the plaintiff, on issue no.1 regarding their claim for partition of their alleged 5/7th share in the suit property. The issue no.2, was, in relation to the pleading raised by the defendants in their written statement. The case of the defendants, that suit property was bequeathed to them by will, was subject of issue no.2 and on appreciation of the evidence, the trial Court has recorded a finding on issue no.2, in favour of the defendants. Issue no.3 was in respect

of the entitlement of the plaintiffs for partition and separate possession and finding recorded by the trial court is against the plaintiffs. The pleading raised by the defendants, regarding application of the principles of res judicata under Section 11 of the Code of Civil Procedure was the subject of issue no.3A. The trial Court recorded a finding in favour of the defendants, holding that the suit is barred by the res judicata. With this findings, the trial Court dismissed the suit by the judgment and decree passed on 27th March, 1986.

5. The plaintiffs, had filed the Civil Appeal No. 282 of 1989 in the Court of the Additional District Judge, Pandharpur, Dist. Solapur. This appeal also, after hearing the parties, is dismissed by the appellate Court by the judgment and decree passed on 15th January, 1998.

6. The copy of the original will, is not on record. The certified copy / photo copy of the will was permitted to be tendered on record. It is allowed by way of secondary evidence justifiably. The trial Court in paragraph no.7, has referred to the Criminal Case No.578 of 1978. The trial Court has, thus permitted the photo copy of the will and accepted the said document as Exhibit 71, and after considering oral and documentary evidence, justifiably dismissed the suit. The first appellate Court on appreciation of the oral as well as documentary evidence concurred with the findings recorded by the trial Court.

7. After hearing the learned Counsel for the appellants, in my view, no substantial question of law is involved in this second appeal.

8. Second Appeal is, therefore, dismissed in limine. No costs.

Sd/-

(S.B.DESHMUKH, J.)